U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 12211357

Date: OCT. 1, 2020

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as an assistant professor, robotics and mechanical engineering. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the record does not establish that the Beneficiary has the education required for the offered job. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will withdraw the Director's decision and remand the matter to the Director for further consideration and entry of a new decision.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS FOR COLLEGE AND UNIVERSITY TEACHERS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). Generally, by approving the labor certification, the DOL certifies that there are insufficient United States workers who are able, willing, qualified, and available for the offered position at the time of the application. 20 C.F.R. § 656.1(a)(1). Under Section 212(a)(5) of the Act, U.S. workers are considered qualified for the job if they are at least minimally qualified for the job offered to the alien. However, an employer that files for certification of employment of a college or university teacher may select an alien who is found to be "more qualified" than each U.S. worker who applied for the job opportunity. 20 C.F.R. § 656.18(d). The Board of Alien Labor Certification Appeals (BALCA) has determined that this "more qualified" standard applies in cases involving college or university teacher positions regardless of whether the employer used the basic labor

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing, which in this case is May 31, 2019. *See* 8 C.F.R. § 204.5(d).

certification process at 20 C.F.R. § 656.17 or the special handling process applicable to college and university teachers under 20 C.F.R. § 656.18. *Matter of East Tennessee State University*, 2010-PER-00038 (BALCA Apr. 18, 2011)(*en banc*).[2]

II. THE BENEFICIARY'S EDUCATION

A petitioner must establish a beneficiary's possession of all DOL-certified job requirements by a petition's priority date. 8 C.F.R. § 103.2(b)(l), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). The educational requirement for the offered position is a U.S. master's degree in mechanical engineering, engineering design technology, or a related field. Part H. 14 lists the following specific skills or other requirements: "[m]ust have any level of demonstrated knowledge of: 1) drafting; 2) 3D design; 3) machine design; and 4) simulation using CAD software. At Part J of the labor certification, the Beneficiary listed his highest level of education as a master's degree in media arts and sciences completed at [redacted] in 2014.

With the petition, the Petitioner submitted a copy of the Beneficiary's master of science degree in media arts and sciences issued by [redacted] in September 2014, together with his transcripts. It also submitted letters indicating that the Beneficiary had the special skills required by Part H.14. of the labor certification. In a request for evidence (RFE), the Director requested evidence that the Beneficiary's master's degree in media arts and sciences relates the fields of mechanical engineering or engineering design technology as required by the labor certification.

In response to the RFE, the Petitioner submitted a letter from [redacted] Associate Department Head of the Media Arts and Sciences program at [redacted] was the Beneficiary's graduate research advisor at [redacted] He described [redacted]'s media arts and sciences program and emphasized the importance of research projects in the program. He asserted that students are expected to learn the required skills for [redacted] and computer aided engineering to design and create the parts needed for their research projects. He stated that the Beneficiary's master of science degree was "largely considered equivalent" to a degree in engineering design technology. He asserted that [redacted] does not have a graduate program named "engineering technology design" and that the media arts and sciences program can "be considered an equivalent program at [redacted]." He stated that the Beneficiary's graduate research thesis was titled [redacted] and "is directly related to the field of [redacted]," [redacted] further stated that the Beneficiary created "two innovative [redacted] devices which were demonstrated at two academic conferences, and was granted two USPTO patents on various aspects of the technology."

In response to the RFE, the Petitioner also submitted a letter from [redacted] Graduate Administrator at [redacted] stated that [redacted]'s media arts and sciences program focuses on the invention, study, and creative use of new technologies, and that the Beneficiary's master of science degree in media arts and sciences is related to the field of engineering design technology. The Petitioner also submitted course descriptions from [redacted] University and [redacted] Community College related to engineering design technology in response to the RFE.

[2] Labor certifications involving a college or university teaching position may be filed under the basic labor certification process at 20 C.F.R. § 656.17 or the special handling process at 20 C.F.R. § 656.18.

In his decision, the Director determined that the Petitioner did not provide sufficient evidence establishing that the Beneficiary's master's degree in media arts and sciences relates the fields of mechanical engineering or engineering design technology as required by the labor certification. Thus, he determined that the Beneficiary does not have the education required for the offered job. On appeal, the Petitioner asserts that it met its burden of proof in this matter.[3] It submits course descriptions from the Beneficiary's [redacted] courses and information about a graduate thesis in addition to previously submitted evidence. The Petitioner asserts that the Director did not explain why the evidence submitted to the record was insufficient to establish a relationship between the Beneficiary's media arts and sciences degree and the field of engineering design technology. It also asserts that the two letters from [redacted], the Beneficiary's transcripts, and his course descriptions establish the relationship between the fields of study.

Here, the Director did not explain why the evidence submitted by the Petitioner was insufficient to meet its burden of establishing the relationship between the Beneficiary's degree and a degree in engineering design technology by a preponderance of the evidence. Specifically, he noted that the letter from [redacted] stated that the Beneficiary's degree was "largely considered equivalent" to a degree in engineering design technology, but he did not indicate why the letter was insufficient to meet the Petitioner's burden of proof. Further, he did not mention the letter from [redacted] at [redacted] or indicate why her letter was insufficient to meet the Petitioner's burden of proof. He stated that the Beneficiary's transcripts do not show a "relevant element" related to mechanical engineering, engineering design technology, or a related field, but he did not address the Beneficiary's courses in media technology, engineering and computer science, physics of information technology, design, and his research graduate thesis related to [redacted]. Therefore, we will withdraw the Director's decision and remand the matter to the Director for further review of the record and entry of a new decision.

III. ABILITY TO PAY

Although not addressed by the Director in his decision, the record does not contain regulatory required evidence of the Petitioner's ability to pay the proffered wage from the priority date on May 31, 2019, and continuing until the Beneficiary obtains lawful permanent residence.[4] The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may

[3] A petitioner must establish that it meets each eligibility requirement by a preponderance of the evidence. *Matter of Chawathe*, 25 I& N Dec. 369, 375-76 (AAO 2010). To determine whether a petitioner has met its burden under the preponderance standard, we consider not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. *Id.* at 376.

[4] The annual proffered wage is $77,000.

accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

The record does not contain the Petitioner's annual reports, federal tax returns, or audited financial statements for 2019. The Petitioner provided a letter from its controller and interim CFO stating that the Petitioner employs over 100 employees in the United States and has the ability to pay the proffered wage of $77,000. However, the letter does not give any current financial information about the Petitioner, and the audited financial statements submitted to the record from 2016 and 2017 do not establish the Petitioner's ability to pay the wage in 2019.[5] Further, given the additional wage obligation of the Petitioner detailed below, the letter from the Petitioner's controller and interim CFO does not establish its ability to pay.

USCIS records show that the Petitioner has filed at least one Form I-140 petition for another beneficiary. Where a petitioner has filed Form I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See* 8 C.F.R. § 204.5(g)(2); *see also Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other Form I-140 petitions that were pending or approved as of, or filed after, the priority date of the current petition.[6] We do not consider the other beneficiaries for any year that the Petitioner has paid the Beneficiary a salary equal to or greater than the proffered wage.[7]

The Petitioner must document the receipt numbers, names of beneficiaries, priority dates, and proffered wages of these other petitions, and indicate the status of each petition and the date of any status change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, beneficiary obtained lawful permanent residence). To offset the total wage burden, the Petitioner may submit documentation showing that it paid wages to other beneficiaries. To demonstrate that it has the ability to pay the Beneficiary and the other beneficiaries, the Petitioner must, for each year at issue (a) calculate any shortfall between the proffered wages and any actual wages paid to the primary Beneficiary and its other beneficiaries, (b) add these amounts together to calculate the total wage deficiency, and (c) demonstrate that its net income or net current assets exceed the total wage deficiency. Without this information, we cannot determine the Petitioner's ability to pay the combined proffered wages of all of its applicable beneficiaries. On remand, the Director should request additional evidence of the Petitioner's ability to pay and allow the Petitioner reasonable time to respond.

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[5] We note that the auditor's report on internal control attached to the Petitioner's audited financial statements states that the auditor identified "certain deficiencies in internal control… that we consider to be a material weakness."

[6] The Petitioner's ability to pay the proffered wage of one of the other I-140 beneficiaries is not considered:

- After the other beneficiary obtains lawful permanent residence;
- If an I-140 petition filed on behalf of the other beneficiary has been withdrawn, revoked, or denied without a pending appeal or motion; or
- Before the priority date of the I-140 petition filed on behalf of the other beneficiary.

[7] Although the Beneficiary indicated on the labor certification that he had been employed by the Petitioner since September 2017, the record does not contain evidence of any wages paid to the Beneficiary by the Petitioner.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.